No. 22,290

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHNS-MANVILLE SALES CORPORATION,
a Delaware corporation,

Appellant,

v.

ELLSWORTH H. EWALD, aka E. H. EWALD,
dba EWALD CONTRACTING COMPANY, and
RELIANCE INSURANCE COMPANY, a
Pennsylvania corporation, as successor
in interest to Standard Accident
Insurance Company, a Michigan
corporation,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEE RELIANCE INSURANCE COMPANY

JENNINGS, STROUSS, SALMON
& TRASK
By William F. Haug
Gary G. Keltner
111 West Monroe
Phoenix, Arizona 85003
Attorneys For Appellee

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JURISDICTION

This action was commenced by Appellant in the Superior Court of the State of Arizona in and for the County of Maricopa (TR 5-18). It was removed by Appellee to the United States District Court for the District of Arizona pursuant to and in accordance with Title 28, *United States Code,* § 1446, as amended (TR 1-4,

23, 123-126). The action was one within the original jurisdiction of the District Court of the United States pursuant to Title 28, *United States Code,* § 1332 (1964), in that the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs (TR 8) and is between citizens of different states — Appellant being a corporation of the State of Delaware and not a citizen of the State of Pennsylvania, and Appellee being a corporation of the State of Pennsylvania, with its principal place of business in the City of Philadelphia, Pennsylvania (TR 2). None of the parties in interest properly joined and served as defendants being a citzen of the State of Arizona (TR 1-2), the action was removable pursuant to the provisions of Title 28, *United States Code,* § 1441.

Appellee's Motion for Summary Judgment against Appellant was granted, and Appellant's Motion for Summary Judgment against Appellee was denied by the Honorable William P. Copple, Judge of the United States District Court for the District of Arizona, on July 24, 1967 (TR 104-104A).

On August 2, 1967, Appellant filed a "Motion to Vacate Judgment and for Order Granting Plaintiff's Cross-Motion for Summary Judgment, or in the alternative, Motion for New Trial, or in the alternative, Motion to Amend Judgment" (TR 108-113). Appellant failed to appear for oral argument and the motions were denied by minute entry on August 14, 1967 (TR 131).

Appellant's Notice of Appeal was filed on September 12, 1967 (TR 116). Appellant's Appeal Bond was thereafter filed on September 21, 1967 (TR 119-120). Appellant asserts the jurisdiction of this Court pursuant to the provisions of Title 28, *United States Code,§ 1291 (Opening Brief, at 2).*

STATEMENT OF THE CASE

Nature of Action. This action was brought by Johns-Manville Sales Corporation (hereinafter termed "Johns-Manville") against Standard Accident Insurance Company (hereinafter

termed "the Bonding Company") on a bond executed and delivered to Mountain States Telephone and Telegraph Company (hereinafter termed "the Telephone Company") by Ellsworth H. Ewald, doing business as Ewald Contracting Company (hereinafter termed "Ewald," or "the Contractor"), as principal, and the Bonding Company, as surety, for recovery of the value of materials furnished by Johns-Manville to Ewald for use on the bonded job (TR 6-18).

The Job. On November 11, 1963, the Telephone Company extended a written invitation for bids on a manhole and conduit job in the City of Tempe, Arizona.[1] By letter dated November 25, 1963,[2] Ewald submitted his bid, and by letter dated November 26, 1963 (hereinafter termed "the Award of Bid Letter"),[3] the Telephone Company advised Ewald that his bid was the lowest bid received. The letter stated: "A Performance and Payment Bond *will* be required."

The Job Contract. A Specific Job Contract (TR 9-16) dated November 26, 1963, was executed by Ewald, as contractor, and the Telephone Company. The work to be performed was set forth in Exhibit "A" attached to the contract and made a part thereof (TR 9). That exhibit purports to include, *inter alia,* the "Invitation to Bid Letter: Award to Bid Letter: and Contractor's Bid Attached" (TR 13), although none of such items appear as a part of the contract and bond which Johns-Manville attached to the Complaint as the basis of its claim (TR 6-18).[4] The Contract obligates the contractor to complete the work specified in Exhibit "A" in accordance with the Telephone Company's speci-

[1] A copy of this letter appears as a part of Exhibit 1 attached to the Deposition of Samuel Beard taken at Phoenix, Arizona, on April 25, 1967.

[2] *Ibid.*

[3] *Ibid.*

[4] The Complaint has never been amended so as to make the Award of Bid Letter a basis of the allegations contained therein.

fications (Article 1, TR 9) and, with specified exceptions, to "furnish" all necessary materials (Article 2, TR 9). Article 8 renders the contractor responsible for, and obligates him to indemnify and save the Telephone Company harmless from, losses, expenses or claims arising out of the performance of the work (TR 10-11). Article 11 gives the Telephone Company the "right" to require the contractor to furnish a bond covering the full and faithful performance of the contract and the payment of all obligations arising thereunder (TR 11), and Article 13 grants the Telephone Company the "option," as a condition precedent to final payment, to require the contractor to furnish satisfactory evidence that all claims for labor, material and other obligations arising under the contract have been satisfied (TR 12). The contract bears the notation "Approved by Legal Department 1/15/64" (TR 12).

The Bond. Ewald, as principal, and the Bonding Company, as surety, executed and delivered to the Telephone Company, as obligee, their bond dated November 26, 1963 (TR 17). By its terms Ewald and the Bonding Company "are held and firmly bound *unto Mountain States Telephone and Telegraph Company,*" subject to the condition:

> "That if the above bounden Principal shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified to be by the said Principal kept, done and performed at the time and in the manner in said contract specified, and shall pay over, make good and reimburse *to the above named Obligee,* all loss and damage *which said Obligee may sustain* by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise, to be and remain in full force and effect." (TR 17; Emphasis supplied).

The bond refers to the Specific Job Contract and makes it a part thereof (TR 17). The bond bears the notation "Approved as to Form 1/15/64 Akolt, Shepherd & Dick, General Counsel" (TR 17).[5]

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[5] The cited law firm appears to be the Telephone Company's Denver, Colorado, attorneys. See Deposition of Samuel Beard, *supra* note 1, at 21.

Execution of Contract and Bond. Samuel Beard, an agent of the Telephone Company,[6] stated in a deposition that the Specific Job Contract was mailed to Ewald for his signature and was thereafter returned to him with Ewald's signature thereon.[7] The Award of Bid Letter was thereafter attached to the contract.[8] Mr. Beard stated that he had no direct dealings with Bonding Company regarding the preparation, execution and issuance of the bond, which was either mailed or delivered to him by Ewald.[9] Both the bond and the contract were reviewed and approved by the Telephone Company's attorneys in Denver.[10]

Johns-Manville secured an affidavit from Ewald, who was never served with process (Opening Brief, at 4), wherein he stated that he requested the Bonding Company to furnish him with a Performance and Payment Bond and that it was his intent that the Payment Bond provide a source of payment to materialmen in the event of default by him (TR 87). However, Ewald's written "Application for Contractor's Bond" reflects only a request for a "Performance," as opposed to a "Labor and Material," bond (TR 71). The Bonding Company's efforts to take Ewald's deposition (TR 102-103A) were thwarted when Ewald, after learning that he was being sought for service of a subpoena (TR 107), quit his job and left without a forwarding address (TR 105-106).

The Bonding Company's agent who issued the subject bond stated by affidavit that neither Ewald nor the Telephone Company requested of him or, to his knowledge, of anyone else acting for the Bonding Company, that the Bonding Company issue a Payment Bond, or any bond other than that which was in fact

[6] Deposition of Samuel Beard, *supra* note 1, at 5-7.

[7] *Id.* at 25-26.

[8] *Id.* at 28.

[9] *Id.* at 27.

[10] *Id.* at 26.

executed (TR 75-76), and a similar affidavit was submitted by the manager of the Bonding Company's surety claim department (TR 69-70).

The Claim of Johns-Manville. Johns-Manville claims to have delivered to Ewald, at the bonded job, materials having a value of $15,252.00, and that the materials were used by Ewald in the completion of work pursuant to contract between Ewald and the Telephone Company (TR 59-65).

The Judgment. The District Court Judge found that there existed no genuine issue as to any material fact and that the Bonding Company was entitled to a judgment against Johns-Manville as a matter of law (TR 104). The Bonding Company's Motion for Summary Judgment was therefore granted, and Johns-Manville's Motion for Summary Judgment was denied (TR 104-104A).

QUESTIONS PRESENTED

1. Whether an appeal can be taken from the District Court Judge's denial of Appellant's Motion for Summary Judgment and, if so, whether there are questions of material fact which preclude a direction that he grant such judgment.

2. Whether a materialman can, under Arizona law, maintain an independent action on a non-statutory surety bond in which he is not the named obligee, when that bond does not by its terms purport to afford materialmen a right of action thereon or to have been executed for their benefit, and does not contain a condition for their payment.

3. Whether a statement contained in the Telephone Company's Award of Bid Letter that a Performance and Payment Bond "will" be required has, by virtue of that letter's attachment to the construction contract as a part thereof, the effect of converting the bond for performance of the construction contract into a Payment Bond and, if so, whether Johns-Manville was

thereby afforded a right of action on the bond despite the fact that the letter did not by its terms prescribe that materialmen should have a right of action thereon or be benefited thereby.

4. Whether Ewald's failure to furnish the Payment Bond requested in the Award of Bid Letter constituted a breach of his construction contract and the bond for performance of that contract and, if so, whether materialmen who were not parties to either the construction contract or the bond are entitled to a right of action for the breach.

ARGUMENT

Summary of Argument

Johns-Manville asserts a right of action on the subject bond, *first,* on the theory that, pursuant to the authority of *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661 (1956) and *Webb v. Crane Co.,* 52 Ariz. 299, 80 P.2d 698 (1938), the subject bond manifests an intention to benefit and confer a right of action on materialmen and, *second,* on the theory that Ewald's failure to furnish a Payment Bond constituted a breach of his contract with the Telephone Company and his bond for performance of that contract, for which materialmen can, somehow, sue. An analysis of the relevant cases will dispel both assertions.

Under Arizona law, which governs, a third person can sue on a contract to which he was not a party only if the contract itself evidences an intent by the contracting parties, and particularly the promisor, that the third person or some class of which he is a member should have a right of action thereon. The right of action may be expressly conferred or it may be implied from language in the contract which clearly indicates the promisor's intention to be bound to the third person. In the case of statutory surety bonds, a condition for direct payment of materialmen has, in the absence of a provision to the contrary, been held to constitute a sufficient manifestation of the promisor's intention to be bound to materialmen to afford them

an independent right of action on the bond. A condition for performance by the contractor of a promise to "furnish" materials has, on the other hand, been held insufficient to afford materialmen a right of action on the bond. *Porter v. Eyer, supra.* In the case of bonds required by and executed pursuant to statutes which prescribe their terms, the bonds, are, as a matter of public policy, deemed to contain the terms prescribed by the statute and those terms are presumed to have the meaning and effect intended by the legislature.

The bond on which Johns-Manville has sued does not expressly afford materialmen a right of action thereon and it does not purport to be for their benefit. Nor is it conditioned upon their payment. The subject bond was not required by statute and it was not executed pursuant to any statute which prescribed its terms. The bond is, rather, what is commonly termed a Performance Bond, which runs from Ewald and the Bonding Company to the Telephone Company. It simply assures the Telephone Company that the job will be performed in accordance with the construction contract and indemnifies the Telephone Company against any loss which the Telephone Company might suffer by reason of a failure of performance. The construction contract is itself devoid of any promise to pay materialmen; it merely provides that Ewald will "furnish" necessary materials and indemnify the Telephone Company against claims. As such, Johns-Manville cannot, under the rule of *Porter v. Eyer, supra,* maintain an action thereon.

Although the Telephone Company's Award of Bid Letter stated that a Performance and Payment Bond "will" be required, that letter did not prescribe the terms of such a bond, and a Payment Bond was never executed by Ewald and his Bonding Company or insisted upon by the Telephone Company. Johns-Manville could, therefore, have no right of action on the Payment Bond, for it has never existed.

If, by his failure to execute a Payment Bond, Ewald breached

his contract with the Telephone Company and the condition of the bond for its performance, the right of action for that breach is that of the Telephone Company for indemnification of any loss which it may have suffered thereby, and not that of Johns-Manville on the bond which, as executed, nowhere contains a condition for payment of materialmen.

I.

THE DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT WAS NOT AN APPEALABLE ORDER AND THE APPEAL THEREOF SHOULD BE DISMISSED.

The denial of a Motion for Summary Judgment is ordinarily a non-appealable order, because it does not impart finality. *E.g., Morgenstern Chemical Co. v. Schering Corporation,* 181 F.2d 160 (3 Cir. 1950). Finality was imparted to the judgment from which Appellant appeals, not because Appellant's Motion for Summary Judgment was denied, but because Appellee's Motion for Summary Judgment was granted. If this Court should determine that the District Court Judge erred in granting that motion, the conclusive effect of his judgment would thereby be destroyed and the matter should be remanded for reconsideration of Appellant's motion and, if it should again be denied, for trial; but this Court should not itself dispose of that motion.

> "The procedure for summary judgment under Rule 56 is similar and comparable to the procedure for judgment on the pleadings under Rule 12. Indeed, a motion under Rule 12, can, in proper case, be disposed of as a motion for summary judgment under Rule 56. But Rule 12 specifically reserves to the court the right to postpone decision on a motion for judgment on the pleadings until trial. It seems most unlikely that a similar postponement necessarily resulting from the exercise of discretion whenever summary judgment is denied under Rule 56 would create an immediately reviewable issue. So incongruous a consequence should be avoided, unless inescapable." 181 F.2d at 163.

Even if Appellant were to convince this Court that Appellee was not entitled to judgment as a matter of law, it does not inescapably follow that Appellant was itself entitled to judgment as a matter of law.

Under these circumstances Appellant's first and second specifications of error should be dismissed.

II.

UNDER ARIZONA LAW, WHICH GOVERNS, A STRANGER TO A CONTRACT CAN RECOVER ON THE CONTRACT ONLY IF THE THE CONTRACT ITSELF REVEALS AN INTENTION BY THE CONTRACTING PARTIES THAT IT DIRECTLY BENEFIT THE THIRD PERSON OR A CLASS OF WHICH HE IS A MEMBER.

Notwithstanding its assertion to the trial judge, that "defendant's non-surety cases are totally irrelevant to the surety bond before this court. . ." (TR 38), Johns-Manville now cites those cases as its source of the following principle:

> "1. A third person can recover on a contract to which he is not a party only if the contract reveals that the parties to the contract intended that the contract would direcly benefit the third party or a class of which he is a member. *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 261, 428 P.2d 115, 118 (1967); *Irwin v. Murphey,* 81 Ariz. 148, 153, 302 P.2d 534, 537-38 (1956); *Seargeant v. Commerce Loan and Investment Company,* 77 Ariz. 299, 303, 270 P.2d 1086, 1089 (1954); *Treadway v. Western Cotton Oil & Ginning Company,* 40 Ariz. 125, 139, 10 P.2d 271, 375-76 (1932)."

Appellee accepts that principle as a valid statement of Arizona law, which must govern the rights of the parties in this case.

A. THE INTENTION OF THE CONTRACTING PARTIES TO AFFORD THIRD PERSONS A DIRECT RIGHT OF ACTION ON A CONTRACT MUST BE INDICATED IN THE CONTRACT ITSELF.

The Arizona cases state that a third person has enforceable

rights under a contract only if it appears that the contracting parties intended to recognize him (1) as a primary party in interest and (2) as privy to the promise. *Seargeant v. Commerce Loan and Investment Company,* 77 Ariz. 299, 304, 270 P.2d 1086, 1090 (1954); *Irwin v. Murphey,* 81 Ariz. 148, 154, 302 P.2d 534, 538 (1956); *California Cotton Oil Corporation v. Rabb,* 88 Ariz. 375, 379, 357 P.2d 126, 129 (1960). In other words, it must appear that the contracting parties intended to confer a benefit directly upon the third person, and not simply that he would be incidentally benefited by the contract. *Coca-Cola Bottling Company of Tucson v. C.I.R.,* 334 F.2d 875 (9 Cir. 1964); *American Radiator & Standard Sanitary Corporation v. Forbes,* 259 F.2d 147 (9 Cir. 1958). The Arizona Supreme Court "has adopted the rule that the intent must be indicated in the contract itself." *Irwin v. Murphey, supra* at 153, 302 P.2d at 537; *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 428 P.2d 115, 118 (1967).

B. THE PROMISOR'S INTENTION TO BE BOUND TO A THIRD PERSON MUST BE CLEARLY MANIFESTED.

The intent of the promisor, in particular, to be bound to a third person must be "clearly manifested." Thus, the Arizona Supreme Court recently quoted language from a California case, including the following, as supporting the promisor's position that third parties had no right of action on the contract being construed, to-wit:

> "[I]t is now well settled in this state that to give a third party, who may derive a benefit from the performance of a promise, an action thereon, there must have been an intent *clearly manifested by the promisor* to secure some benefit to the third party. . . ." *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association, supra,* 428 P.2d at 119 (Emphasis supplied).

That this is the rule also in Arizona is strongly suggested by the following quotations:

"It is not enough that the loan company may be incidentally benefited by the contract between Seargeant and O'Brien. There must be manifested in the language of the contract *an intent on the part of Seargeant* [the promisor] to assume and discharge O'Brien's obligation to the loan company. . . ." *Seargeant v. Commerce Loan and Investment Company., supra* at 303, 270 P.2d at 1089 (Emphasis supplied).

"There are no express statements in the agreement indicating that any class of persons furnishing work, labor or materials on such dwelling or that Irwin or any person similarly situated, was to directly benefit from it or *that Murphey {the promisor} intended* to be bound to anyone other than Luke. . . ." *Irwin v. Murphey, supra* at 153, 302 P.2d at 537 (Emphasis supplied).

"There is no evidence whatever *that Frost {the promisor} ever promised* Rabb [the third party] that the budget — which is labeled an 'estimate' — would be adhered to. . . ." *California Cotton Oil Corporation v. Rabb, supra* at 375, 357 P.2d at 128 (Emphasis supplied).

In each of the quoted cases the requisite contractual expression of the promisor's intent to confer a right of action upon third persons was found lacking and the third persons were, in each instance, held to have no independent right of action on the subject contract.

III.

IN THE CASE OF SURETY BONDS, THE REQUISITE INTENTION TO BENEFIT THIRD-PARTY MATERIALMEN MUST, IN THE ABSENCE OF AN EXPRESS PROVISION THAT THE BOND IS FOR THEIR BENEFIT, BE MANIFESTED BY A CONDITION FOR THEIR DIRECT PAYMENT.

Materialmen may clearly maintain an independent action against the surety on a bond which expressly provides that they, or some class of which they are a part, may do so. *United States Fidelity and Guaranty Company v. Hirsch,* 94 Ariz. 331, 385 P.2d 211 (1963); *Royal Indemnity Company of New York v.*

Business Factors, Inc., 96 Ariz. 165, 393 P.2d 261 (1964). And, while it has been suggested that no such right of action can accrue without "express language" that the bond shall be for the benefit of third persons (*Struckmeyer, J., dissenting in Porter v. Eyer,* 80 Ariz. 169, 175, 294 P.2d 661, 665 (1956)), the Arizona courts have sustained the right of materialmen to sue on statutory surety bonds containing no such express provision, when those bonds did contain an *express condition* for their direct payment. *Porter v. Eyer, supra; Webb v. Crane Company,* 52 Ariz. 299, 80 P.2d 698 (1938); *Ed Stearman & Sons, Inc. v. State,* 1 Ariz. App. 192, 400 P.2d 863 (1965). The express condition for direct payment was considered a sufficient manifestation of the promisor's intention to be bound to materialmen. Such intention has, however, been held to be negated by other provisions of the bond. *American Radiator & Standard Sanitary Corporation v. Forbes,* 259 F.2d 147 (9 Cir. 1958). Contracts lacking *both* an express statement of intention to benefit third persons *and* a promise to pay them directly have been held to afford materialmen no right of action thereon. *Irwin v. Murphey,* 81 Ariz. 148, 302 P.2d 534 (1956); *cf. Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association,* 102 Ariz. 258, 428 P.2d 115 (1967). A bond, such as that now under consideration, conditioned upon "performance" of a contract wherein the contractor merely promised to "furnish" materials has, in the absence of an express condition for payment of materialmen, been said to afford materialmen no right of action thereon. *Porter v. Eyer,* 80 Ariz. 169, 294 P.2d 661; see also *American Radiator & Standard Sanitary Corporation v. Forbes,* 259 F.2d 147 (9 Cir. 1958). The bond on which Appellant has sued is, like the bond—apart from the statute—in *Porter v. Eyer,* conditioned upon Ewald's "performance" of his contract to "furnish" materials.[11]

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[11]It is, therefore, highly relevant that the Court therein stated that "if the judgment entered is to be sustained" it must be because of the statute involved therein. 80 Ariz. at 171, 294 P.2d at 662.

A. THE REQUISITE CONDITION FOR DIRECT PAYMENT OF MATERIALMEN OR A CLASS OF WHICH THEY ARE A MEMBER MUST BE FAIRLY EXPRESSED BY THE TERMS OF THE BOND ITSELF OR IN THE TERMS OF SOME INSTRUMENT WHICH IS REITERATED THEREIN BY REFERENCE.

The requisite condition for direct payment of materialmen must be found in the terms of the bond itself, or in the terms of some instrument which is reiterated therein by reference.

In two of the cases on which Appellant places primary reliance, *Webb v. Crane Co.* and *Ed Stearman & Sons, Inc. v. State,* both *supra,* the bonds were *required by statute* and were, contrary to the bond here involved, *by their express terms conditioned upon payment of materialmen.* In the context of such express language in the statutory bond, the Arizona Supreme Court, in *Webb,* quoted the following annotation as a correct statement of the law, to-wit:

> "The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, *where the bond contains a condition for their benefit and is intended for their protection,* although the public body is the only obligee named therein, and there is no express provision that such third parties shall have any rights thereunder, is affirmed by the great weight of authority." *Supra* at 310, 80 P.2d at 704 (Emphasis supplied).

In other words, considered in light of the Court's view of the legislative intent behind the statutory expression of public policy requiring such bonds, the express condition for payment of materialmen was held to be sufficient evidence of the promisor's intention to be bound to materialmen to afford them an independent right of action on the bond, even though the bond did not expressly state, in addition to the express condition for their payment, that materialmen should have the right to sue thereon. In *Stearman,* citing the express condition for payment of material-

men in the statutory bond therein involved, the Arizona Court of Appeals, Division One, said:

> "*In the bond in question there is an express requirement that the principal shall promptly pay, among other things, the subcontractors' materialmen,* with the only limitation being that the obligation shall not go beyond the penal sum of the bond. To hold that a supplier of materials to a subcontractor is only an incidental beneficiary, *in view of such express language in the bond,* would constitute the throwing out of a substantial portion of the express provisions of the bond. . . ." 1 Ariz. App. at 195, 400 P.2d at 866 (Emphasis supplied).

Since the bonds in both *Webb* and *Stearman* were, unlike the bond herein, required by statute, the Court was justified in considering, as it did, the overriding intent of the legislature in requiring the bonds, to enlarge and give meaning to their express provisions. The bond on which Johns-Manville has sued herein is not such a bond and legislative intent has no place in its construction.[12] Moreover, the intent of a single party to a non-statutory bond should not, as does the intent of the legislature in the case of statutory bonds, create a presumption that all the parties shared that intent.

B. BONDS REQUIRED BY AND EXECUTED PURSUANT TO STATUTES WHICH PRESCRIBE THEIR TERMS ARE, AS A MATTER OF PUBLIC POLICY, DEEMED TO CONTAIN THE TERMS PRESCRIBED BY THE STATUTE, WHICH TERMS ARE DEEMED TO HAVE THE MEANING INTENDED BY THE LEGISLATURE, AND THE PARTIES ARE PRESUMED TO HAVE INTENDED THE EXECUTION OF A BOND CONTAINING THE STATUTORY TERMS.

The rule that a bond furnished pursuant to statutory mandate

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[12]With regard, however, to the question of legislative intent and public policy, it is worthy of note that the statute which required and prescribed the terms of the bond involved in *Porter v. Eyer* has been repealed. 80 Ariz. at 173, 294 P.2d at 663-664.

will be construed by the terms of the statute which prescribes its terms was authoritatively announced by the Arizona Supreme Court in *Commercial Standard Ins. Co. v. West,* 74 Ariz. 359, 361, 249 P.2d 830, 831 (1952), wherein the court said:

> "The bond in question is a little different in form and language to the above-quoted statute. Since, however, the bond is furnished because of the statutory mandate we shall construe the bond by the terms of the statute. This rule is well recognized and gives expression to the legislative intent.
>
> > 'While a surety stands on the letter of his contract, the law at the time of the contract is to be considered in interpreting it, and if it gives to the contract a certain legal effect, that law is as much a part of the contract as if incorporated in it, and the surety is bound according to such law. The liability on statutory undertakings is measured by the terms of the statute, rather than by the wording of the instrument, for the sureties engage with eyes open to such statute. * * *' 50 Am. Jur., Suretyship, Section 33.
>
> The Supreme Court of Iowa, in the case of Charles City v. Rasmussen, 210 Iowa 841, 232 N.W. 137, 139, 72 A.L.R. 638, succinctly stated the rule as follows:
>
> > 'The bond in this case is a statutory bond, and the liabilities of the parties to the bond must be measured by the statute and not by the wording of the bond. * * * We have said repeatedly that any additions to such bond will be treated as surplusage, and any omission of the provisions of the statute will be read into the bond. * * *'
>
> This is in accord with our holdings. . . ." (Emphasis supplied).

The rule has since been repeatedly reaffirmed. *Porter v. Eyer, supra; Employer's Liability Assurance Corporation v. Lunt,* 82 Ariz. 320, 313 P.2d 393 (1957); *Royal Indemnity Company of New York v. Business Factors, Inc.,* 96 Ariz. 165, 393 P.2d 261 (1964); *see Webb v. Crane Company, supra; Ed Stearman & Sons v. State, supra.* Parties who execute a bond pursuant to such a statute are presumed to have intended the execution of a bond containing the prescribed statutory terms and those terms

are presumed to have the meaning intended for them by the legislature. See *Porter v. Eyer, supra; Webb v. Crane Company, supra; Ed Stearman & Sons v. State, supra.*

C. THE SUBJECT BOND WAS NOT REQUIRED BY STATUTE AND WAS NOT EXECUTED PURSUANT TO A STATUTE PRESCRIBING ITS TERMS. IT CONTAINS NO EXPRESS DECLARATION OF INTENTION THAT MATERIALMEN SHOULD HAVE A RIGHT OF ACTION THEREON OR BE BENEFITED THEREBY AND IT CONTAINS NO EXPRESS CONDITION FOR DIRECT PAYMENT OF MATERIALMEN. IT IS CONDITIONED MERELY UPON "PERFORMANCE" OF A CONTRACT WHEREBY THE CONTRACTOR IS TO "FURNISH" MATERIALS, AND, AS SUCH, AFFORDS MATERIALMEN NO INDEPENDENT RIGHT OF ACTION THEREON.

The subject bond does not, as did the bonds in *Royal Indemnity Company of New York v. Business Factors, Inc.,* 96 Ariz. 165, 393 P.2d 261 (1964), and *United States Fidelity and Guaranty Company v. Hirsch,* 94 Ariz. 331, 385 P.2d 211 (1963), contain any express declaration of intention that materialmen should have a right of action thereon or that they should be benefited thereby. Nor does the subject bond, as did the bonds in *Webb v. Crane Company* and *Ed Stearman & Sons, Inc. v. State,* contain an express condition for direct payment of materialmen. The subject bond was not, as was the bond in *Porter v. Eyer,* required by and executed pursuant to a statute which prescribed its terms and thereby conditioned it upon direct payment of materialmen. And, its terms not being prescribed by any statute, as were the terms of the statutory bonds involved in *Webb, Stearman* and *Porter,* resort may not be had to some overriding legislative intent to give them meaning. The subject bond is, rather, like the bond which—exclusive of the terms of the statute which were read into it—was executed in *Porter v. Eyer,* conditioned upon "performance" of a contract whereby the contractor agreed to "furnish" the necessary materials. As such, the following language from *Porter v. Eyer* is controlling:

> "Generally speaking, in order that a suit be maintainable on a contractor's bond by or for the use of materialmen the bond must be construed so as to include the materialmen within its coverage, i.e., to give him some beneficial interest therein. Hence in the instant case *if the judgment entered is to be sustained,* it must be because the following statute, which was then in force and effect, brought plaintiff within the coverage of the bond. . . ." *Supra* at 171, 294 P.2d at 662-663 (Emphasis supplied).

Where, as here, there is no such statute to supply the missing condition for payment of materialmen, a materialman's right of action cannot be sustained.

IV.

THE TELEPHONE COMPANY'S AWARD OF BID LETTER, WHICH STATED THAT A PERFORMANCE AND PAYMENT BOND "WILL" BE REQUIRED, DID NOT CONVERT THE PERFORMANCE BOND INTO A BOND FOR DIRECT PAYMENT OF MATERIALMEN.

Johns-Manville contends that the Telephone Company's Award of Bid Letter, which stated that a Performance and Payment Bond "will" be required, converted the Performance Bond into a bond conditioned upon payment of materialmen.[13] This contention is logically fallacious, for no bond was ever executed which was in fact conditioned upon payment of materialmen. The Award of Bid Letter contains nothing more than an executory request by the Telephone Company for a Payment Bond, the terms of which were not prescribed, which bond was never executed by Ewald and his Bonding Company and was never insisted upon by the Telephone Company, whose attorneys approved acceptance of the bond which was executed.

Under such circumstances, the following quotations from

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[13]This argument loses force at the outset when it is remembered that Johns-Manville did not attach a copy of this letter, which it now asserts to be of such critical importance, to the Complaint as a part of the Contract and Bond on which it sued.

relevant decisions of the Eighth and Fourth Circuit Courts of Appeal are appropriate, to-wit:

> "When all is said the case is simply this: That Opdahl by his contract agreed to give a bond obligating himself to pay the claims of materialmen, but he failed to give any such bond. *The surety company signed the bond which was executed, and no other.* The bond itself did not provide for the payment of materialmen, nor did the contract contain any such provision.
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> "The case is not difficult, unless we try to make it different from what it really is. . . ." *Babcock & Wilcox v. American Surety Co.,* 236 Fed. 340, 342-343 (8 Cir. 1916) (Emphasis supplied).
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> "It is insisted, however, that the bond is obligated to laborers and materialmen because the contract provides that the contractors shall furnish a bond for their protection as required by the laws of the United States. But the trouble is that the contractors did not furnish such bond. . . ." *United States v. Starr,* 20 F.2d 803, 805 (4 Cir. 1927).

A similar result was reached in *United States v. American Fence Const. Co.,* 15 F.2d 450 (2 Cir. 1926).

The bond here under consideration is not like the bond in *Daughtry v. Maryland Casualty Co.,* 48 F.2d 786 (4 Cir. 1931), which was conditioned upon performance of a contract which expressly stated that the contractor "concurrent with this contract, *does execute a bond. . . guaranteeing the faithful performance of this contract and the payment of the laborers' wages, bills for materials, and all expenses incurred by the contractor.*" 48 F.2d at 787 (Italics supplied by the court). In sustaining the right of a materialmen to sue on that bond the court said:

> "In the case at bar, the contract provided that the bond to be given should guarantee, not only the faithful performance of the contract, but also the payment of the bills for labor and materials. *This was not left to future action, but the bond was executed concurrently with the execution of the contract and the latter so states,* the language being that the 'contractor * * * will, *and concurrent with this contract does* execute a

> bond * * * guaranteeing * * * the payment of the laborers' wages, bills for materials, and all expenses incurred by the contractor.' While it is true, as argued, that the contract was signed by the contractor and not by the surety, it is true also that the contract containing the provision quoted was attached to and made a part of the bond which the surety did sign. In other words, the surety says in the bond, 'I am guaranteeing the performance of the contract hereto attached.' The attached contract says, 'The contractor will give bond guaranteeing the payment of labor and materials *and gives it concurrently herewith.*' Both the surety and the contractor, therefore, gave the bond to the city with the statement in writing attached hereto that same was to be given, *and was given,* to guarantee payment for labor and materials." 48 F.2d at 788 (Emphasis supplied).

The court, nevertheless, expressly reaffirmed the holding of *United States v. Starr, supra,* saying:

> "By no fair and reasonable construction of the bond and contract in the Starr Case could it be said that the parties intended that the bond there in question should protect laborers and materialmen. . . ." 48 F.2d at 789.

The case of *Glens Falls Indemnity Co. v. American Awning & Tent Co.,* 55 R.I. 284, 180 Atl. 367 (1935), dealt with a claim similar to that herein made by Johns-Manville, as follows:

> "We think *a specific undertaking to pay* for labor and materials ought to positively appear within the bond itself, or inasmuch as the bond is only one of a series of instruments, in some one of such instruments *clearly incorporating by reference such provision as a part of the bond.* We must, therefore, look for such a provision in the contract or in other instruments incorporated in it." 180 Atl. at 369 (Emphasis supplied).

Finding no such provision in either the bond or the contract, the Court rejected a contention that the incorporation into the construction contract of specifications which obligated the contractor to furnish a bond "for the prompt payment in full of all just debts for labor, materials and equipment incurred in the construction" was equivalent to a "specific undertaking" for payment and therefore gave laborers and materialmen a direct right of action on the bond, saying:

"The board, however, owes no duty to third parties to take a bond containing these requirements, and is not itself bound to do so. The state is not here asserting that the board was bound to take such a bond only, or that even section 1.17 was for the benefit of subcontractors. The board was free, if it so chose, to waive these requirements and take a bond without them. We think it did so in this case. 180 Atl. at 373.

* * * *

"If we refer to the standard specifications for the language which respondents claim imports an obligation, *we find merely what amounts to a general notification by the board to all bidders that it will require a certain bond before the acceptance of any bid and the closing of a contract. But neither in the bond in the instant case, nor in the contract does it carry this intention into effect.* 180 Atl. at 373 (Emphasis supplied).

Referring to language in a case cited by the bond claimants, the Court said:

"If what is meant by this language is that a statement in the proposal or the specifications specifying that the required bond shall contain a promise to pay for labor and materials is equivalent to language setting out an express promise or undertaking in the bond or contract itself, then we cannot follow that reasoning. The weight of authority on that point is clearly the other way. *In order for the laborer or materialman to recover, there must not only be an intent to secure some benefit to him, but there must also be a legally enforceable promise for his benefit. . . .*" 180 Atl. 372 (Emphasis supplied).

The Court concluded:

[W]e do not feel justified in extending by judicial construction the scope and effect of a surety bond particularly one where, as in the instant case, we must go far afield to find the necessary operative language to read into the bond in order to broaden the obligation of the surety." 180 Atl. at 374.

Nowhere do the Arizona cases suggest that a contracting party, such as the Telephone Company, can by its unilateral declaration of intention to require a Payment Bond, the terms of which are not prescribed, convert a non-statutory bond for performance of a construction contract into a bond for payment

of materialmen. On the contrary, the cases are clear that the intention of the "parties" determines the rights of third persons, with particular emphasis upon the intention of the promisor. The bond was a three-party contract and, as such, the intention of one, or less than all, of the parties cannot impose obligations or liabilities upon the Bonding Company which are not fairly expressed in and carried into effect by the bond which it executed. The Award of Bid Letter does not state that a Payment Bond was executed concurrently therewith and the bond which was executed does not state that it was executed pursuant to and in accordance with the requirements of the Award of Bid Letter. Moreover, the terms of that bond were not specifically prescribed. Absent some such evidence in the bond itself that a bond for payment of materialmen was not only intended by the parties but that the intention was being carried into effect by the bond in question, materialmen can have no rights thereon. *Glen Falls Indemnity Co. v. American Awning & Tent Co.,* 55 R.I. 284, 180 Atl. 367 (1935), reargument denied, 55 R.I. 308, 181 Atl. 297 (1935); *United States v. Starr,* 20 F.2d 803 (4 Cir. 1927); *United States v. American Fence Const. Co.,* 15 F.2d 450 (2 Cir. 1926); *Babcock & Wilcox v. American Surety Co. of New York,* 236 Fed. 340 (8 Cir. 1960); *cf. Daughtry v. Maryland Casualty Co.,* 48 F.2d 786 (4 Cir. 1931).

V.

IF EWALD'S FAILURE TO FURNISH THE PAYMENT BOND REQUESTED IN THE AWARD OF BID LETTER CONSTITUTED A BREACH OF HIS CONSTRUCTION CONTRACT AND THE BOND FOR ITS PERFORMANCE, ANY RIGHT OF ACTION FOR THAT BREACH MUST BE THAT OF THE TELEPHONE COMPANY AND NOT OF SOME STRANGER TO THE CONTRACT AND BOND.

The construction contract does not purport to be for the benefit of materialmen and, as previously noted, obligated Ewald merely to "furnish" materials and to indemnify and hold the Telephone Company harmless against claims. The Telephone Com-

pany had certain options, which, if insisted upon, would incidentally have benefited materialmen, such as the right to require a Payment Bond and to withhold final payment pending receipt of satisfactory evidence that all materialmen had been paid. But no Payment Bond was ever executed. If Ewald breached his contract with the Telephone Company by his failure to execute a Payment Bond, the right of action for that breach is that of the Telephone Company on the contract and the bond for its performance which was executed, by way of indemnification for its loss, if any, and not that of materialmen in whom no rights were ever vested.

The rights of Johns-Manville against Ewald must rest not upon Ewald's bonded contract with the Telephone Company, but upon Ewald's contract with Johns-Manville. If Johns-Manville had deemed a payment bond essential for its protection, it could have exacted such a bond as a condition of its contract. It did not, however, do so and the record is devoid of evidence that it relied upon the bond which had been given to the Telephone Company. Under the circumstances the following comments of the Arizona Supreme Court in the recent case of *Pioneer Plumbing Supply Company v. Southwest Savings and Loan Association, supra,* are particularly appropriate:

> "Pioneer and Rural [material suppliers] contend that it is the policy of Arizona to protect the rights of those who furnish labor and materials to improve property. With this principle we agree; however, those rights must be established under existing law. . . ." 428 P.2d at 122.
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> "[I]t may well be that labor and materialmen in order to secure business and work, have furnished labor and material without properly protecting themselves by contract or otherwise. . . ." 428 P.2d at 123.

Material suppliers who in their quest for profits take such risks without adequate security, should not in their search for payment be permitted, by the windfall of judicial construction, to rewrite a surety bond to which they were not a party, so as to afford themselves a right of action thereon.

CONCLUSION

The bond on which Johns-Manville has sued does not by its terms purport to afford materialmen any right of action thereon or to have been entered into for their benefit. It does not by any of its terms contain a condition for their payment. The District Court Judge was therefore correct in his judgment that the Bonding Company was entitled to judgment as a matter of law and the judgment should be affirmed.

Respectfully submitted,

JENNINGS, STROUSS, SALMON & TRASK
111 West Monroe
Phoenix, Arizona 85003
ATTORNEYS FOR APPELLEE

WILLIAM F. HAUG

By _____
William F. Haug
and
GARY G. KELTNER
_____
Gary G. Keltner

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

WILLIAM F. HAUG
_____
William F. Haug
GARY G. KELTNER
_____
Gary G. Keltner

Three copies of the foregoing brief were delivered this ..... day of March, 1968, to:

KRAMER, ROCHE, BURCH, STREICH
and CRACCHIOLO
567 First National Bank Building
411 North Central Avenue
Phoenix, Arizona 85004
ATTORNEYS FOR APPELLANT

By GARY G. KELTNER
Gary G. Keltner